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### Why Appellate Courts Have Rejected the Argument that the Defense of Marriage Act Trumps the Parental Kidnapping Prevention Act

Barbara Cox

*California Western School of Law*, [bjc@cwsl.edu](mailto:bjc@cwsl.edu)

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# WHY APPELLATE COURTS HAVE REJECTED THE ARGUMENT THAT THE DEFENSE OF MARRIAGE ACT TRUMPS THE PARENTAL KIDNAPPING PREVENTION ACT

BARBARA J. COX\*

## INTRODUCTION

Lisa Miller has “disappeared” with her daughter, IMJ, and a Vermont family court judge has found her in contempt and ordered her arrest.<sup>1</sup> This is the latest stage in the ongoing struggle between Lisa and her lesbian ex-partner, Janet Jenkins, which began in November of 2003 over custody of their daughter, IMJ. IMJ was born while Lisa and Janet were partners in an intact Vermont civil union. Lisa’s “kidnapping” of their daughter and refusal to relinquish custody to Janet on January 1, 2010, as ordered by the Vermont court in November 2009, has thrust this dispute into the spotlight once again.<sup>2</sup>

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\* Clara Shortridge Foltz Professor of Law, California Western School of Law. I would like to thank California Western School of Law; Dean Steven Smith and Associate Dean William Aceves; Brigham Young University, Clark School of Law, and Professor Lynn Wardle for supporting the Symposium where this paper was presented. I would also like to thank the Williams Institute, UCLA School of Law, where I presented an earlier version of this work. I owe a debt of gratitude to Kellie Delaney and Sarah Garrick for the help they provided me with this Article. Thanks also to the editors of the International Law Journal for publishing the Symposium papers and for their efforts in editing this Article, and to my spouse, Peg Habetler, for twenty years of support as we both seek marriage equality for same-sex couples and our families.

1. Brent Curtis, *Arrest Warrant Issued for Virginia Mom*, RUTLAND HERALD (Vt.), Feb. 24, 2010, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20100224/NEWS04/2240355/1002/NEWS01&Template=printart>.

2. See Press Release, Gay and Lesbian Advocates & Defenders, *Mother Seeks Public Help to Locate Missing Child* (Jan. 4, 2010), <http://www.glad.org/uploads/docs/press-releases/press-release-miller-jenkins-01-10.pdf>. The Vermont trial court judge ruled in November 2009 that Lisa must relinquish custody of their daughter, IMJ, to Janet after Lisa’s continuing refusals to allow visitation between Janet and their daughter. In all of 2008 and 2009, Lisa only

Regardless of one's opinion as to whether Lisa or Janet should have custody, it seems unlikely that many people believe a mother should kidnap her child to avoid sharing custody with the child's other parent, especially when such kidnapping violates a direct order of the court handling the custody dispute.<sup>3</sup> Our national policy since 1980, when Congress adopted the Parental Kidnapping Prevention Act (PKPA),<sup>4</sup> has been to prevent exactly this type of situation in disputes over child custody or visitation.<sup>5</sup> In that legislation, Congress found that pre-PKPA law contributed to the tendency of parties in custody disputes to "frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, [and] obtaining of conflicting orders by the courts of various jurisdictions . . . ."<sup>6</sup>

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permitted about 24 hours of parent-child contact between Janet and IMJ in each year. Brief for Defendant-Appellee, at 4-5, *Miller-Jenkins v. Miller-Jenkins*, No. 2009-473 (Vt., Jan. 20, 2010), 2010 WL 1502577. Lisa's lawyers, after trying to resign as her attorney in January, returned to the Vermont Supreme Court in March 2010, appealing the trial court's order based on their assertion that Janet is not IMJ's parent. In this third appeal to that court, Janet's lawyers have argued that "the law of the case" doctrine should prevent Lisa from continuing to raise this argument, *id.* at 6-12, especially since the Vermont Supreme Court previously expressly ruled that Janet is considered to be IMJ's parent based on Vermont law. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006). Both sides' briefs are available at [www.glad.org/work/cases/miller-jenkins-v-miller-jenkins](http://www.glad.org/work/cases/miller-jenkins-v-miller-jenkins).

3. Of course, Lisa disputes Janet's right to be recognized as a parent. See Brief for Defendant-Appellee, *supra* note 2, at 11-12. However, Lisa and Janet agreed together to have a child, Janet was involved as a parent of IMJ throughout their time together as a family, and Lisa herself indicated on the dissolution form that Janet was entitled to "parent-child" visitation. See *infra* Part II.A.

4. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566 (codified in scattered sections of 28 U.S.C., 42 U.S.C., and 92 U.S.C.) [hereinafter PKPA].

5. Unless specifically noted, custody disputes and visitation disputes are treated the same throughout this Article. "Visitation determinations" were specifically included in amendments to the PKPA by Act of Nov. 12, 1998, Pub. L. No. 105-374, 112 Stat. 3383 (codified at 28 U.S.C. § 1738A(b)(9) (2006)). They are defined as "a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and modifications." 28 U.S.C. § 1738A(b)(9) (2006).

6. PKPA, *supra* note 4, § 7(a)(3). Congress also stated that the purposes of the PKPA were to: "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family

But now some attorneys and commentators have argued that the Defense of Marriage Act (DOMA),<sup>7</sup> which purports to permit a court in one state to refuse to recognize the judgment of a court in another state if the judgment involves the marriages (and perhaps other legal relationships) of same-sex couples,<sup>8</sup> trumps the protections of the PKPA as applied to parents in same-sex relationships.<sup>9</sup> Arguments like this, so far unsuccessful in appellate courts, convince people like Lisa Miller to ignore the valid orders of the Vermont Family Court and refuse to share custody of their daughter. Lisa now finds herself in contempt of court and subject to arrest because she believes that she has the right to prevent Janet from seeing their daughter. The lawyers who argued her case seemingly convinced her that DOMA permitted her to disregard the Vermont court's decision.

Some brief background is first needed. Under Article IV of the U.S. Constitution, "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>10</sup> Congress adopted the Full Faith and Credit Act in the First Congress; it now provides that the acts, records, and judicial proceedings of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such

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relationships for the child"; "avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;" and "deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards." *Id.* § 7(c)(4)-(6). All of these issues arise in the *Miller-Jenkins* litigation.

7. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)) [hereinafter DOMA].

8. *Id.* § 2(a), 28 U.S.C. § 1738C (2006).

9. *See id.* § 3(a), 1 U.S.C. § 7 (2006) ("No State, territory, possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe, respecting a relationship between person of the same-sex that is treated as a marriage under the law of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

10. U.S. CONST. art. IV, § 1.

State . . . from which they are taken.”<sup>11</sup> Both the PKPA and DOMA were adopted under the power given to Congress in the “Effects Clause” of the Constitution.<sup>12</sup>

The United States Supreme Court has held that states owe “exacting” full faith and credit obligations to judicial proceedings of other states, and that there is no “roving public policy exception” that can be used to preclude recognition of valid, final judgments.<sup>13</sup> Attempts to use a public policy exception to prevent “migratory divorce . . . ground to a halt, in fact, through the Supreme Court’s insistence on these ‘exacting’ obligations.”<sup>14</sup> As Professor Emily Sack

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11. 28 U.S.C. § 1738 (2006).

12. See U.S. CONST. art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”); PKPA, *supra* note 4, § 7(b), 28 U.S.C. § 1738C note (2006) (“For those reasons it is necessary to . . . establish national standards under which the courts of such jurisdictions will determine . . . the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.”); DOMA, *supra* note 7, § 2(a), 28 U.S.C. § 1738C (discussing the effect to be given to judgments and public acts of other states that concern “a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship”).

13. *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). In conflicts cases concerning the statutes of different states, the Supreme Court permits state courts to use a public policy exception to refuse to follow another state’s law if doing so would violate the forum state’s fundamental public policy. *Id.* Although commentators argue that the public policy exception is unconstitutional in certain situations, see, e.g., Larry Kramer, *Same Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 965 (1997), the Supreme Court has consistently allowed it to be used in statutory cases while rejecting its use in judgment cases. See also RESTATEMENT (SECOND) OF THE CONFLICTS OF LAW § 117 (1971) (which states “[a] valid judgment rendered in one state . . . will be recognized and enforced in a sister state even though the strong public policy of the latter state would have precluded recovery in its courts on the original claim”); Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 21-23 (2008) (same).

14. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 452-53 (2005) (citing *Williams v. North Carolina*, 317 U.S. 287 (1942) (holding that North Carolina must recognize the Nevada divorce of two North Carolina residents)). For a further discussion of the *Williams* cases in the context of interstate recognition of adoptions by same-sex couples, see Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV.

notes, “use of a public policy exception to refuse recognition to out-of-state judgments is not permitted.”<sup>15</sup>

But Lisa’s lawyers and others argue that DOMA, on its face, requires the opposite result because it allows a state to refuse to give effect to judicial proceedings concerning same-sex relationships treated as a marriage<sup>16</sup> in another state or rights and claims arising from those relationships.<sup>17</sup> Thus, if DOMA is interpreted to the full

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751, 761-770 (2003) [hereinafter Cox, *Adoptions*].

15. Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497, 500 (2005) (citing *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (requiring Mississippi to give recognize a Missouri judgment based on a gambling contract made in Mississippi where it was void)). As the Supreme Court noted in *Baker*, the “Full Faith and Credit Clause ‘ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.’” *Baker*, 522 U.S. at 233 (citing *Fauntleroy*, 210 U.S. at 237).

16. DOMA, *supra* note 7, § 2(a), 28 U.S.C. § 1738C (2006). Of course, whether a Vermont civil union would fall within DOMA’s purview depends on whether a civil union is considered to be “a relationship between persons of the same sex that is treated as a marriage.” The Vermont civil union was created in response to *Baker v. State*, 744 A.2d 864 (Vt. 1999), but the Vermont legislature “deliberately chose to create the status of civil union in order to avoid broadening the concept of marriage to include same-sex couples.” Sack, *supra* note 15, at 507. She argued that the Federal DOMA and state DOMAs that refer only to marriages “may not necessarily establish a public policy against recognizing same-sex civil unions from other states.” *Id.* at 507; *see also* Christopher D. Sawyer, Note, *Practice What You Preach: California’s Obligation to Give Full Faith and Credit to the Vermont Civil Union*, 54 HASTINGS L.J. 727 (2003) (arguing that anti-marriage statutes should be confined to marriages alone and exclude other legal relationships). For a similar discussion concerning domestic partnerships, *see* Cox, *Adoptions*, *supra* note 14, at 778. This Article analyzes whether Virginia must recognize the parenting order from Vermont based on a civil union without discussing this potentially limiting argument about DOMA’s application outside of marriage. *But see* *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683-84 (9th Cir. 2006) (rejecting DOMA challenge by couple in California domestic partnership because it was not a marriage); *Bishop v. Oklahoma*, 447 F. Supp. 2d 1239, 1247-48 (N.D. Okla. 2006) (couple lacked standing to challenge DOMA because civil union not treated as a marriage under Vermont law).

17. *See, e.g.*, David M. Wagner, *A Vermont Civil Union and A Child in Virginia: Full Faith and Credit?*, 3 AVE MARIA L. REV. 657, 667-78 (2005); Rena M. Lindevaldsen, *Same-Sex Relationships and the Full Faith and Credit Clause: Reducing America to the Lowest Common Denominator*, 16 WM. & MARY J. WOMEN & L. 29 (2009) (arguing that DOMA should be interpreted as overriding

breadth of its language, courts will be permitted to ignore judgments that must otherwise be recognized under the Full Faith and Credit Clause and the Supreme Court's jurisprudence.

Fortunately, no appellate court has read DOMA to require this result. Such a reading of DOMA would take the country back to a world before the PKPA, when parental kidnapping happened regularly and parents spent years litigating child custody and visitation in multiple courts.<sup>18</sup> It would also change the Supreme Court's current rule of judgment recognition to allow for consideration of a "roving public policy exception," as is now used to allow states to refuse recognition to other states' statutes, so long as the forum state has sufficient contacts with the litigation to assert its own interests in the case.<sup>19</sup>

This Article seeks to explain why courts should not be permitted to interpret DOMA to displace judgment recognition based on a forum state's public policy against legal relationships for same-sex couples. If courts interpret DOMA in this manner, nothing would prevent Congress from exempting other types of judgments from the protection of the Full Faith and Credit clause, thereby permitting relitigation of judgments that are now considered final and binding in every state. Clearly, same-sex couples would not be the only group affected by such a drastic change in current Full Faith and Credit jurisprudence.<sup>20</sup>

Section II of this Article discusses two recent cases that included arguments that, under DOMA, a court in one state should refuse to recognize another state's judgment in the context of a custody or

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PKPA). Professor Lindevaldsen served as Lisa Miller's attorney in part of this litigation. *See supra* note 2.

18. It is particularly troubling that such a significant change in Supreme Court jurisprudence would be considered in cases where biological mothers are trying to prevent their lesbian ex-partners from having custody or visitation with the children that both women decided to have and raise together.

19. *Baker*, 522 U.S. at 233.

20. For example, Professor Courtney G. Joslin's article, discusses the same cases that this Article does, and outlines the potential problems that could arise if prior determinations of parental status are not afforded interstate recognition in the areas of paternity and surrogacy, both areas that are highly contested between the states. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 600-16 (2009).

visitation dispute between the parents. Although these arguments were successful in Virginia and Alabama trial courts, both states' appellate courts have thus far held that DOMA could not be used to trump the PKPA under the facts of those cases, even though both states had strong state "mini-DOMA" statutes or constitutional amendments. This section also uses the *Miller-Jenkins* case to show how the PKPA, the Uniform Child Custody Jurisdiction Act (UCCJA),<sup>21</sup> and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>22</sup> function together to protect the jurisdiction of the first court involved in child custody or visitation litigation.

The first part of Section III considers the situation that existed before Congress adopted the PKPA and the problem of interstate kidnapping and relitigation of parental custody and visitation cases. A review of the problems that led Congress to adopt the PKPA underscores the chaos that would result from interpreting DOMA to trump the PKPA. Increasing numbers of children would be thrust into the nightmare of litigation exemplified in the ongoing *Miller-Jenkins* litigation, which has been waged in the courts of two states and which resulted in the kidnapping of a young child by one of her mothers.

The second part of Section III focuses more broadly on the problems that would result from permitting states to ignore valid, final judgments when the first court's jurisdiction is unquestioned. Using law review commentaries and court opinions, this section establishes not only that DOMA must not be interpreted to override the protections of the PKPA, but that DOMA's application to any judgment should be viewed with suspicion.

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21. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1968) (amended 1988). Vermont adopted the UCCJA as Title 15, Chapter 19 of the Vermont Statutes. See VT. STAT. ANN. tit. 15, §§ 1031-1051 (2010).

22. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 257 (1997 & Supp. 2006). Virginia adopted the UCCJEA as Chapter 7.1 of the Virginia Code. See VA. CODE ANN. §§ 20-146.1-20-146.38 (2010). For a discussion of the changes between these two uniform acts, see Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301 (1999).



II. *MILLER-JENKINS AND A.K. v. N.B.*

This section discusses two cases dealing with arguments that “DOMA trumps the PKPA.” Trial courts in both Virginia and Alabama adopted this argument, but the intermediate appellate courts found it to be unpersuasive, despite the presence of statutes or constitutional amendments in those states that express a public policy refusing to recognize same-sex couples’ legal relationships.

A. *Miller-Jenkins v. Miller-Jenkins cases involving the Vermont and Virginia Courts*1. *A Summary of the Cases*

Many who are interested in interstate recognition of same-sex couples’ marriages, civil unions, or domestic partnerships have been focused on the recent, and still unresolved, custody and visitation case in Vermont and Virginia. Lisa, the biological mother of a daughter, filed an action for dissolution of her Vermont civil union on November 24, 2003.<sup>23</sup> Lisa and her partner, Janet, entered into a civil union in Vermont on December 19, 2000, while they were living in Virginia. They later decided to have a child together, and Lisa was impregnated using the sperm of an anonymous sperm donor. Their daughter was born on April 16, 2002, in Virginia, and the family moved to Vermont in August 2002.<sup>24</sup>

Lisa filed for dissolution after living in Vermont until September 2003. She filed the initial papers in Family Court in Rutland County, Virginia, asking for dissolution of her civil union with Janet, and noting that their daughter was “the biological or adoptive children of said civil union.”<sup>25</sup> She also asked “that the Court award the plaintiff legal rights and responsibilities for the minor children” and “physical

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23. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006).

24. *Id.*

25. Summons, Complaint for Civil Union Dissolution; Notice of Appearance and Affidavit of Child Custody at 1, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 RWMM (Vt. Fam. Ct. Nov. 24, 2003) (on file with author). The Complaint notes that, at the time it was filed: (1) Lisa lived in Winchester, Virginia; (2) Janet lived in Fair Haven, Vermont; and (3) Janet had lived in Vermont continuously since August 5, 2002. *Id.*

rights and responsibilities of the minor children,” and “that the Court award the defendant [Janet] suitable parent/child contact (supervised).”<sup>26</sup> Presumably, Janet did not adopt IMJ because she believed that her parental status based on their civil union was sufficient protection.<sup>27</sup>

The Vermont trial court issued a Temporary Custody Order on June 17, 2004, awarding Lisa temporary legal and physical responsibility for IMJ.<sup>28</sup> Janet was awarded “parent-child contact” with their child for two weekends in June 2004, in Virginia; one week in July 2004, in Virginia; and the third full week of every month starting in August 2004, in Vermont. Janet was also awarded daily telephone contact.<sup>29</sup>

Lisa disagreed with the Vermont court’s decision. On July 1, 2004, she filed an action in the Circuit Court in Frederick County, Virginia, seeking to relitigate Janet’s visitation with their daughter. The Virginia trial court asserted jurisdiction because IMJ had been living in Virginia for more than six months prior to the filing date. The court held that Lisa was the “sole biological parent” of IMJ, she received sole “legal rights, privileges, duties and obligations as parent” for their daughter, and Janet could not claim parentage of or visitation with IMJ.<sup>30</sup>

The Virginia trial court ruled that Virginia’s “Marriage Affirmation Act” (MAA), codified at section 20-45.3 of the Virginia Code, controlled the case.<sup>31</sup> That statute, which took effect on the same day that Lisa filed her suit in Virginia, states:

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26. *Id.* at 2.

27. See Rachal E. Shoaf, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 WM. & MARY J. WOMEN & L. 267, 276 (2005). As Shoaf noted, Janet should not be punished for not adopting her child “because her rights were equally guaranteed under the state’s civil union laws.” *Id.* Whether Janet would have fared better as an adoptive parent is unknown, although the few courts that have analyzed the question of interstate recognition of adoption decrees have upheld the adoptions. See *infra* section III.B.2.

28. *Miller-Jenkins*, 912 A.2d at 956.

29. *Id.*

30. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 331 (Va. Ct. App 2006).

31. Order and Certification for Interlocutory Appeal at 2, *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Ch. Ct. September 9, 2004) (on file with author).

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.<sup>32</sup>

The Virginia trial court concluded: (1) Janet based her claim of parentage under Vermont law on her civil union with Lisa; and (2) the civil union was null and void under Virginia law. Consequently, the court held that Virginia's version of the UCCJEA, codified at section 20-146.1 of the Virginia Code, did not recognize Janet as a "person acting as a parent" who "claims a right to legal custody under the laws of this Commonwealth,"<sup>33</sup> and neither the UCCJEA nor the PKPA applied to the case.<sup>34</sup>

After the Virginia court's decision, Janet filed a contempt action in Vermont against Lisa for failing to abide by the Vermont Court's order. The Vermont trial court held that "Lisa has willfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it."<sup>35</sup> In Virginia, Janet also filed an interlocutory appeal of the trial court's order.<sup>36</sup>

The dispute between the parties focused on whether Virginia had jurisdiction over Lisa's custody petition, even though Lisa previously filed for dissolution and custody in Vermont and stated that the Vermont court should award "parent-child contact" to Janet. Lisa chose to enter into a civil union with Janet and then moved to Vermont where the civil union would clearly be recognized. But when "she received a temporary order she did not like, she not only refused to comply with it, but she actually initiated a separate action in a Virginia court, asking that court to disregard the fact that she already

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32. VA. CODE ANN. § 20-45.3 (2004).

33. Order and Certification for Interlocutory Appeal, *supra* note 31, at 2; see also Mark Strasser, *When is a Parent not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299 (2001).

34. Order and Certification for Interlocutory Appeal, *supra* note 31, at 2.

35. Order at 4, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 Rddm (Vt. Fam. Ct. Sep. 2, 2004) [hereinafter Order of Contempt] (on file with author).

36. Order and Certification for Interlocutory Appeal, *supra* note 31.

initiated an action involving the same issues . . . in Vermont.”<sup>37</sup> Congress enacted the PKPA to prevent exactly this type of parental disregard for an unfavorable custody or visitation decision.

## 2. *Application of PKPA and the UCCJEA to this case*

This section applies the PKPA and the UCCJEA to the *Miller-Jenkins* case and explains why the Virginia trial court should have refused jurisdiction over the case under those two statutes.<sup>38</sup> According to Congress, the PKPA was needed because the laws and practices in different courts are “often inconsistent and conflicting,” and parties in child custody and visitation disputes often disregard a negative court order from one state and seek to “obtain[] . . . conflicting orders by the courts of various jurisdictions.”<sup>39</sup> Congress needed to act because child custody and visitation decrees can be modified over time if needed to provide for the child’s best interest; consequently, courts did not always treat them as subject to the Full Faith and Credit Clause.<sup>40</sup> Thus, “. . . Congress’ chief aim in enacting PKPA was to extend the requirements of the Full Faith and Credit clause to custody determinations . . . .”<sup>41</sup>

Through the PKPA, Congress established “national standards” for determining jurisdiction and for providing “the effect to be given” to court decisions from other states.<sup>42</sup> One purpose of the PKPA was to “promote cooperation between State Courts,” and to “discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child . . . .”<sup>43</sup>

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37. Order of Contempt, *supra* note 35, at 4-5.

38. This section does not discuss the UCCJA because it played no part in the Virginia trial court’s decision to use DOMA instead of the PKPA, although the UCCJA continues to control Vermont’s law in child custody disputes. *See supra* note 21.

39. PKPA, *supra* note 4, § 7(a)(2), (a)(3), 28 U.S.C. § 1738A note (2006).

40. *Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988).

41. *Id.* at 183; *see also* *Bergman v. Zempel*, 807 N.E.2d 146, 154 n.8 (Ind. Ct. App. 2004) (PKPA’s purpose was to require enforcement of another state’s custody decision as “a federal obligation”)

42. PKPA, *supra* note 4, § 7(b), 28 U.S.C. § 1738A note (2006).

43. *Id.* § 7(c)(1), (c)(4).

Under the PKPA, “a contestant” is “a[ny] person, including a parent, who claims a right to custody or visitation of a child.”<sup>44</sup> Janet qualifies as a “contestant” because the Vermont laws controlling her civil union with Lisa presumed her to be the parent of any child born into their intact civil union.<sup>45</sup> Additionally, a child’s “home state” is “the State in which, immediately preceding the time involved, the child lived with [her] parents . . . for at least six consecutive months . . . .”<sup>46</sup> Janet and Lisa moved to Vermont in August 2002 and they lived there together until Lisa took IMJ back to Virginia with her in September 2003. Thus, Vermont was IMJ’s “home state” and Virginia could not have qualified as her “home state” in November 2003, when Lisa filed for dissolution of the civil union, because Lisa and IMJ had not been living there for six months.

Under the PKPA, Vermont had jurisdiction to issue the initial custody order if the trial court had jurisdiction under state law (which the Vermont court had under Vermont’s version of the UCCJA and its civil unions statutes),<sup>47</sup> and the state “had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of [her] removal . . . by a contestant, . . . and a contestant continues to live in such State . . . .”<sup>48</sup> Vermont was IMJ’s home state until September 2003 when Lisa took her to Virginia, and Janet continued to live in Vermont.

Additionally, “the jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long” as the requirements specified in the previous paragraph are met and a contestant continues to live in that state (Janet continues to live in Vermont).<sup>49</sup> A different court may modify the original court’s decisions only if “the court of the other State no longer has jurisdiction.”<sup>50</sup> Thus, because Janet remained

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44. PKPA, *supra* note 4, § 8(a), 28 U.S.C. § 1738A(b)(2) (2006).

45. *Miller-Jenkins*, 912 A.2d at 970.

46. PKPA, *supra* note 4, § 8(a), 28 U.S.C. § 1738A(b)(4) (2006).

47. The Vermont Supreme Court found such jurisdiction under Vermont’s version of UCCJA, codified in part at 15 VT. STAT. ANN. tit. 15, § 1032(a) (2006). *Miller-Jenkins*, 912 A.2d at 958.

48. PKPA, *supra* note 4, § 8(a), 28 U.S.C. § 1738A(c)(1), (c)(2)(A)(ii) (2006).

49. *Id.*, 28 U.S.C. § 1738A(d) (2006).

50. *Id.*, 28 U.S.C. § 1738A(f)(2) (2006).

domiciled in Vermont, Vermont retained jurisdiction; consequently, Virginia could not modify the Vermont court's determination that Janet was entitled to visitation with IMJ. Additionally, "[a] court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court in another State" so long as that other state properly had jurisdiction.<sup>51</sup> Thus, Virginia could not exercise jurisdiction because Vermont already asserted jurisdiction in the matter, at Lisa's request, and the facts of the case satisfied the jurisdictional requirements of the Act.

Under the PKPA, "where home-state jurisdiction is available, it has priority over any other jurisdictional basis."<sup>52</sup> However, the Virginia trial court concluded that Virginia's MAA did not recognize Janet's status as a valid "contestant" under the PKPA because that status inured from the presumption of parentage arising from her civil union with Lisa, a union that was null and void in Virginia. But Janet was not seeking recognition of her civil union or her parental status in Virginia; she was seeking recognition of the custody order by the Vermont court in a prior proceeding begun by Lisa.

Analysis under the UCCJEA results in the same conclusion: Virginia was obliged to accept Vermont's custody order recognizing Janet as one of IMJ's parents. The UCCJEA "was formulated to clarify ambiguities and reconcile conflicting interpretations regarding the circumstances under which a state has jurisdiction to make or modify custody or visitation orders."<sup>53</sup> The "stated objective" of the

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51. *Id.*, 28 U.S.C. § 1738A(g) (2006).

52. Kathleen A. Hogan, *Custody Jurisdiction*, 26 FAM. ADVOC. 22, 24 (2004) (citing 28 USC § 1738A(c)(2)(A) (2006)). In her discussion of full faith and credit for adoption decrees, Rhonda Wasserman notes that statutes like the Uniform Adoption Act and the PKPA limit jurisdiction to the home state of the child for the prior six months in order to ensure that the state has "a significant relationship" with the parties and issues, "which is the very objective of the most widely followed choice-of-law approach embodied in the Restatement (Second) on Conflict of Laws." Wasserman, *supra* note 13, at 44.

53. Hogan, *supra* note 52, at 24-25. As of 2010, forty-eight states and the U.S. Virgin Islands have adopted the UCCJEA, including Virginia. Legislation to adopt the UCCJEA is pending in both Massachusetts and Vermont, the only states that have not adopted it. *A Few Facts About The...Uniform Child Custody Jurisdiction & Enforcement Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. L., [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-uccjea.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp) (last

UCCJEA is to reconcile the UCCJA with the PKPA “by providing clearer standards for which states can exercise original jurisdiction over a child custody determination.”<sup>54</sup> Like the PKPA, the UCCJEA focuses solely on which state courts should have jurisdiction in a wide range of proceedings.<sup>55</sup> Also like the PKPA, the UCCJEA gives the “home state” priority in making the initial orders in these proceedings, and it defines the home state as “the state in which the child has lived with a parent or a person acting as a parent for at least six consecutive months immediately before commencement of a custody proceeding.”<sup>56</sup> The only state that qualified as IMJ’s “home state” was Vermont because Lisa and IMJ lived in Virginia for fewer than six months when Lisa filed for dissolution in Vermont.

Once the home state court asserts jurisdiction, it has continuing jurisdiction until it decides that it has lost jurisdiction, usually because no contestant remains in the home state.

Only the decree state can make this determination; a new state of residence cannot. *Thus, relocation of the child and one parent and the establishment of a new home state does not entitle the new state to act, nor does it end the exclusive continuing jurisdiction of the original decree state.*<sup>57</sup>

If a party involved in the litigation wants to modify the original decree in another state, that party “must obtain an order from the original decree state stating that it no longer has jurisdiction.”<sup>58</sup> Thus, Vermont had continuing jurisdiction over the parties’ dispute until it decided

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visited Jan. 2, 2011).

54. Franki J. Hargrave, *Practitioner’s Guide to the Uniform Child Custody Jurisdiction and Enforcement Act*, 44 ADVOC. (IDAHO) 8, 8 (June 2001) (citing Prefatory Note, UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 257 (1997 & Supp. 2006)).

55. Hogan, *supra* note 52, at 25.

56. *Id.* at 25; *see also* Irene Casson Gilbert, *Does the Court Have Jurisdiction Over Custody?*, 43 ORANGE CNTY. LAW. 54, 55 (2001) (noting that the UCCJEA gives the home state “absolute priority,” while the UCCJA expresses only a “preference” for the home state, making it compatible with the PKPA, which also gives the home state “absolute priority”).

57. Hogan, *supra* note 52, at 26 (emphasis added).

58. Hargrave, *supra* note 54, at 9 (citing UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 203 cmt. at 27, 9 U.L.A. 257 (1997 & Supp. 2006)).

otherwise, and Virginia could not assert jurisdiction because it adopted the UCCJEA to govern custody disputes.

It is clear that the policies behind the PKPA and the UCCJEA are to prevent parents, such as Lisa, from doing exactly what she attempted to do in this case. She filed a case in Vermont recognizing her partner's right to parent-child contact with the daughter born during their civil union. When she did not receive the result she desired, she took her daughter, moved to Virginia, and sought a new order, ignoring Vermont's decision in the case.

### 3. *Should DOMA change this result?*

Virginia purports to ignore the Vermont court's order pursuant to DOMA and Virginia's MAA, which declares civil unions to be null and void in Virginia. But Janet was not seeking recognition of her civil union in Virginia; she was seeking recognition of the Vermont court's order, which was issued by IMJ's home state pursuant to its jurisdiction under both the PKPA and the UCCJEA. The fact that Virginia considered Janet's civil union (and therefore her claim to be IMJ's parent) to be "null and void" in Virginia should have been of little consequence; Virginia's public policy has no bearing on this case. Rather than focusing on whether Virginia would recognize the women's Vermont civil union, the Virginia court should have focused on the national policy, as stated in the PKPA, that parents cannot simply change courts seeking a different result when they are unhappy with the decision of a court having proper jurisdiction.

The Vermont court appropriately exercised jurisdiction over the dissolution and child custody action brought within six months of when all three family members lived together in Vermont. The error in this litigation occurred when the Virginia court, not having initial jurisdiction in the case, attempted to modify the Vermont court's order granting visitation to the non-biological parent, in violation of both the PKPA and the UCCJEA. The court mistakenly determined that Virginia's MAA, which declares rights flowing from civil unions to be void in Virginia, controlled the case.

But the Virginia Court of Appeals rejected the trial court's analysis, holding that Virginia lacked jurisdiction over the case. Lisa argued that the Virginia trial court properly exercised jurisdiction over the custody dispute under DOMA and the MAA. Rejecting this



argument, the Court of Appeals stated “Lisa argues that DOMA, enacted in 1996, effectively trumps the PKPA, enacted in 1980, thus enabling the trial court to exercise jurisdiction over Lisa’s petition. We disagree.”<sup>59</sup>

The Court of Appeals noted that Lisa had cited no authority in support of her argument that DOMA trumped the PKPA, and rather than finding a repeal by implication due to an apparent conflict (a disfavored result), the court concluded it could interpret the two statutes to reconcile with each other.<sup>60</sup> The PKPA’s chief aim was to provide full faith and credit protections to child custody or visitation decisions; DOMA’s chief aim was “to defend the institution of traditional heterosexual marriage” and “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions.”<sup>61</sup> The Court of Appeals concluded that “[n]othing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations.”<sup>62</sup> The Court confronted Lisa’s argument directly and found that it was misplaced.

This case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ’s custody and visitation. It cannot.<sup>63</sup>

The court concluded that “the trial court erred in failing to recognize that the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court.”<sup>64</sup> The court explicitly refused to consider whether

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59. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 336 (Va. Ct. App. 2006).

60. *Id.* at 336-37.

61. *Id.* at 337.

62. *Id.*

63. *Id.* The court continued: “By filing her complaint in Vermont, Lisa invoked the jurisdiction of the Vermont court . . . . By operation of the PKPA, her choice of forum precluded the courts of this Commonwealth from entertaining countervailing assertions and prayers.” *Id.* The Court also rejected Lisa’s argument that the MAA also forbade extending full faith and credit to the Vermont court’s decision. *See id.*

64. *Id.*

Virginia law “recognizes or endorses” legally recognized same-sex relationships, whether the MAA was constitutional, and whether the Vermont court’s rulings were correct. Instead, it stated that the issue before the court “is the narrow one of jurisdiction. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction. The PKPA forbids her prosecution of this action in the courts of this Commonwealth.”<sup>65</sup>

This jurisdictional limitation is consistent with the general rules requiring interstate recognition of judgments. Although courts in several states may have jurisdiction to decide a case, the Full Faith and Credit Clause ensures that the first judgment in a case must be recognized by courts in all other states.<sup>66</sup> The Supreme Court does not require full faith and credit to one state’s statutes or “acts” because another state may have “overlapping legislative jurisdiction;” but once a court with jurisdiction issues a judgment, that judgment is entitled to full faith and credit, even though the statute underlying the judgment is not.<sup>67</sup> Thus, “[s]ister-state acts rarely get any faith and credit until their application is reduced to judgment. And then, the faith and credit is given to the judgment, not to the act.”<sup>68</sup>

Unfortunately, the parties’ dispute did not end with the Virginia Court of Appeals’ decision, although it was the only time that Lisa’s argument that DOMA trumps the PKPA was considered by the courts. An appeal to the Virginia Supreme Court was dismissed because Lisa did not file a notice of appeal.<sup>69</sup> But when Janet later tried to register the Vermont custody order in Virginia, in a second decision, the same Frederick County Circuit Court judge reversed the juvenile and domestic relations court and refused to allow it to be registered.<sup>70</sup> On appeal, the Court of Appeals summarily reversed the circuit court’s order, holding that its initial decision controlled and that the “law of

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65. *Id.* Accordingly, the court remanded the matter to the trial court with instructions “to extend full faith and credit to the custody and visitation orders of the Vermont court.” *Id.*

66. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 321 (1992).

67. *Id.* at 321-22.

68. *Id.* at 322.

69. *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 825 (Va. 2008).

70. *Id.*

the case” doctrine did not permit Lisa’s appeal.<sup>71</sup> The Virginia Supreme Court agreed and dismissed Lisa’s appeal.<sup>72</sup> Lisa also appealed the Vermont trial court’s order—that Janet was a parent based on the birth of her daughter while she was living in an intact civil union with Lisa—to the Vermont Supreme Court, and that court confirmed Janet’s parental status.<sup>73</sup>

As the introduction makes clear, Lisa continues to ignore the decisions of the Vermont courts, the Virginia courts, and the United States Supreme Court. The case is currently on appeal for the third time to the Vermont Supreme Court, and Janet continues to be separated from her daughter.

*B. A.K. v. N.B. cases involving California and Alabama courts*

A case from California and Alabama raises similar arguments about the relationship between DOMA and the PKPA, on an even more tenuous factual basis than that in *Miller-Jenkins*. While the case does not squarely confront the question of whether DOMA trumps the PKPA because the women in the case were not married or in any other legal relationship, it shows how litigants are attempting to use DOMA to preclude interstate recognition of any parental rights arising from same-sex relationships. If DOMA’s broad reach is extended in this way, then it has the potential to eliminate PKPA protections for parents in any same-sex relationship.<sup>74</sup>

The Alabama Supreme Court vacated the lower courts’ decisions, finding that the case did not present “a justiciable case over which the

71. *Id.* The “law of the case” doctrine requires that nothing decided in a first appeal can be re-examined on a second appeal in the same case, between the same parties, and on the same facts. *Id.* at 826.

72. *Miller-Jenkins*, 661 S.E.2d at 826, *cert. denied*, 129 S. Ct. 726 (2008).

73. *See Miller-Jenkins*, 912 A.2d at 970.

74. Obtaining an adoption decree strengthens the parental rights of the non-biological parent but, if those rights are based on the partnered status of the parents, then litigants may still raise DOMA as precluding PKPA protections. For decisions rejecting the argument that DOMA allows states to ignore adoption decrees by parents in same-sex relationships, see *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) and *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010) (requiring State officials in Oklahoma and Louisiana, respectively, to issue new birth certificates following adoption of a child by same-sex couples in other states). For a discussion of these cases, see *infra* Part III.B.2.

courts in this State may exercise jurisdiction.”<sup>75</sup> Its reasoning indicated that N.B. initiated litigation in Alabama over which she tried to litigate A.K.’s interests but did not serve her or name her as a defendant.<sup>76</sup> While the Alabama Supreme Court vacated the decisions at issue, this Article discusses the case and the DOMA/PKPA argument it raises in an effort to illustrate the extent to which parties are attempting to expand DOMA’s reach to nullify interstate recognition of parental rights based on any same-sex relationship. Thus, although the case no longer has precedential value, it remains useful for a fuller analysis of the issues discussed in this Article.

A.K. and N.B. lived together in a lesbian relationship in California, where they decided to have a child together via artificial insemination. N.B. was the birth mother of their child, who was born in April 1999.<sup>77</sup> In 2004, the parties ended their relationship. N.B. moved with their child to Alabama in August 2005, while A.K. remained in California. In September 2005, A.K. filed a “Petition to Establish Parental Relationship” describing herself as a “presumed mother” under California Family Code section 7611(d) and seeking custody of and visitation with the child.<sup>78</sup> When A.K. filed her petition, N.B. and their child had been living in Alabama for fewer than six months. The California trial court ordered the parties to engage in mediation but the record is unclear whether they did. On August 15, 2006, the parties and their attorneys engaged in a contested hearing about custody and visitation.<sup>79</sup>

In July 2006, the California Supreme Court decided the case of *Elisa B. v. Superior Court*,<sup>80</sup> holding that “a woman with whom the biological mother of a child has lived in a committed relationship can, in law, also be deemed a ‘mother’ of that child by analogy to provisions permitting a presumed father of a child to be adjudicated a

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75. *Ex parte* N.B., No. 1080440, 2010 WL 2629064, at \*5 (Ala. June 30, 2010).

76. *Id.*

77. *Id.* at \*1.

78. A.K. v. N.B., No. 2070086, 2008 WL 2154098, at \*1 (Ala. Civ. App. May 23, 2008), *vacated, sub. nom. Ex parte* N.B., No. 1080440, 2010 WL 2629064 (Ala. 2010).

79. *Id.* at \*2.

80. *Elisa B. v. Super. Ct. of El Dorado Cnty.*, 117 P.3d 660 (Cal. 2005).

parent of that child.”<sup>81</sup> Based on that decision, on September 11, 2006, the California trial court held that A.K. and N.B. were both parents of their child.<sup>82</sup>

N.B. filed a “Petition for Temporary Custody” in Alabama on September 6, 2006, alleging the Alabama court had jurisdiction because she and the child had lived in Alabama for over a year.<sup>83</sup> On September 8, 2006, the Alabama court issued an *ex parte* order granting N.B. sole custody pending further orders and preventing the child’s removal from Alabama. Despite a complete lack of notice to A.K., the Alabama court subsequently ruled that California did not have jurisdiction because N.B. and the child had moved to Alabama before the California court issued its decision. But the California trial court continued to assert jurisdiction, ordering that the child’s birth certificate be amended to reflect A.K. as her second parent and that visitation with A.K. should occur in February and March 2007.<sup>84</sup>

In April 2007, A.K. appeared in the Alabama court for the first time, objecting to N.B.’s suit and seeking relief from the judgment. She contended that, under the PKPA and the UCCJEA, only the California court could exercise jurisdiction over the visitation dispute because it entered a proper visitation order first and retained continuing jurisdiction.<sup>85</sup> The Alabama court denied her motion, holding that the California court’s proceedings “were not ‘consistent with’” PKPA and it was not required under the UCCJEA to defer to the California court.<sup>86</sup> A.K. appealed.

The Alabama Court of Appeals determined that California had appropriately exercised jurisdiction over the dispute under the PKPA and California’s UCCJEA because the child lived in California for the six months preceding the filing date, and because A.K., a contestant in the case, continued to reside in California.<sup>87</sup> Thus, the Alabama trial court “would now be bound, under federal constitutional and statutory

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81. *A.K.*, 2008 WL 2154098 at \*1; *see also* *Elisa B.*, 117 P.3d at 673.

82. *A.K.*, 2008 WL 2154098 at \*2.

83. *Id.*

84. *Id.* at \*2-3.

85. *Id.*

86. *Id.*

87. *Id.* (citing 28 U.S.C. § 1738A(c)(1), (c)(2)(A) (2006) and CAL. FAM. CODE § 3421(a)(1) (West 2008)).

law, to give full faith and credit to the judgment of the California court rendered on September 11, 2006, that A.K. is a parent of the child.”<sup>88</sup> The PKPA also prevented the Alabama court from re-examining the California custody decision because “it bars courts in other states from exercising jurisdiction to make a custody or visitation determination during the pendency of proceedings in the child’s home state.”<sup>89</sup>

The Court of Appeals recognized the parallel with the *Miller-Jenkins* litigation and quoted extensively from the Virginia Court of Appeals opinion.<sup>90</sup> Finding itself “confronted with the priority of the California court’s jurisdiction in the case,” the Court of Appeals held the PKPA pre-empted Alabama’s assertion of jurisdiction and required dismissal of N.B.’s case.<sup>91</sup> N.B. then sought a Writ of Certiorari to the Supreme Court of Alabama, which was granted.<sup>92</sup>

Briefs were filed on April 1, 2009 for N.B.<sup>93</sup> and on May 6, 2009 for A.K.<sup>94</sup> What is perhaps most important, for purposes of this Article, is whether this case presents a DOMA versus PKPA analysis at all.<sup>95</sup> The parties never entered into a domestic partnership while they were living in California, although limited rights were then available under a previous California domestic partnership statute.<sup>96</sup>

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88. *Id.* at \*4.

89. *Id.*

90. *Id.* at \*5.

91. *Id.*

92. *Ex parte* N.B., No. 1080440, 2010 WL 2629064, at \*1 (Ala. 2010).

93. Petitioner’s Brief, *Ex parte* N.B., 2010 WL 2629064 (Ala. 2010) (No. 1080440) (on file with author).

94. Respondent’s Brief, *Ex parte* N.B., 2010 WL 2629064 (Ala. 2010) (No. 1080440), available at <http://www.lambdalegal.org/in-court/cases/nb-v-ak.html> (follow hyperlink to brief).

95. See Joslin, *supra* note 20, at 596-598 (arguing that this case does not involve DOMA because of the lack of a legal relationship between the parties). Professor Joslin also cites a Social Security ruling in favor of providing benefits to the child of a non-biological parent in a lesbian relationship, finding that DOMA was not controlling because “no aspect of the claimant’s case is based on a marriage.” *Id.* at 597-98 (internal quotation marks omitted).

96. Assembly Bill No. 25 was signed on October 14, 2001 by California Governor Gray Davis, and provided certain benefits to domestic partners who register with the state. See 2001 Cal. Stat. 893. One of the benefits of registering as domestic partners is that the couple becomes eligible for step-parent adoption, rather than second-parent adoption, a more onerous process. See Cox, *Adoptions*, *supra* note 14, at 753. California now provides the full range of spousal rights to same-sex

Thus, it would seem that this case presents a straight-forward application of the PKPA to protect the initial court's assertion of jurisdiction over the dispute because there was no marriage between the parties that might trigger DOMA's influence.

But N.B.'s brief to the Alabama Supreme Court constructs the "DOMA trumps PKPA" conflict as follows. A.K.'s relationship with N.B. is the basis for her claim to be a parent to their child since A.K. did not adopt or bear the child. A.K. argued that she was a "presumed mother" of the child under section 7611(d) of the California Family Code and the *Elisa B* decision.<sup>97</sup> Finding that both A.K. and N.B. were parents of the child,<sup>98</sup> the California trial court ordered that A.K. be added as a second parent to the child's birth certificate and that A.K. was entitled to visitation with the child.<sup>99</sup>

N.B.'s brief to the Alabama Supreme Court asserted that recognizing the California decision would violate Alabama public policy as stated in that state's Sanctity of Marriage Amendment (SMA) and the Marriage Protection Act. The SMA states:

A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized as a marriage or other union replicating marriage.<sup>100</sup>

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couples, although "marriage" itself was eliminated as a result of Proposition 8. *See* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (discussing domestic partnership, Proposition 8, and marriage rights for same-sex couples).

97. *A.K.*, 2008 WL 2154098, at \*1. Under California's version of the Uniform Parentage Act, codified at CAL. FAM. CODE §§ 7600-7730 (West 2010), "a woman with whom the biological mother of a child has lived in a committed romantic relationship can, in law, also be deemed a 'mother' of that child by analogy to provisions permitting a presumed father of a child to be adjudicated a parent of that child." *A.K.*, 2008 WL 2154098, at \*1.

98. *Id.* at \*2.

99. *Id.* at \*3.

100. ALA. CONST. art. 1 § 36.03(g). Alabama's Marriage Protection Act (MPA) states: "The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued." ALA. CODE § 30-1-19(e) (2010). Because N.B. and A.K. did not marry in California, the MPA seems inapplicable. Whether the SMA is applicable is also

Because A.K. obtained her parental rights in California based on the parties' relationship, N.B. asserted that DOMA and the SMA permit Alabama to refuse to recognize the California decision, in spite of the PKPA's contrary command and in spite of the fact that A.K. and N.B. did not have a legal relationship as partners.<sup>101</sup> She asserted that "when Congress passed DOMA in 1996, it made clear that each State has the sovereign power to determine for itself what effect, if any, to give orders arising from same-sex relationships."<sup>102</sup> N.B. concluded that "sixteen years after the PKPA became law, Congress enacted DOMA – placing it in the same statutory section at the PKPA – to clarify a state's right to refuse to give legal effect to child custody orders arising from same-sex unions treated as marriage."<sup>103</sup>

If N.B.'s argument had been accepted, DOMA's impact would have expanded beyond cases involving interstate recognition of the marriages (or even legal relationships) of same-sex couples and instead used to eliminate any right given to individuals whenever those rights arise from a same-sex relationship. It seems ludicrous that this could be true. The Alabama Supreme Court did not answer this question, and in vacating both lower courts' decisions, it prevented this argument from gaining traction.

### III. WHY DOMA MUST NOT BE INTERPRETED TO TRUMP THE PKPA

Federal legislation must not be interpreted to adopt a national policy that allows courts to ignore the PKPA and use DOMA to

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disputed by A.K., but for purposes of this discussion the SMA's applicability is assumed.

101. Brief for Petitioner, *supra* note 93, at 9-10 (summary of argument).

102. *Id.* at 30. N.B. tried to expand the reach of DOMA by asserting that Congress used the term "marriage" because in 1996, alternative institutions, such as civil unions or domestic partnerships, did not yet exist. *Id.* at 30 n.7 ("Congress, therefore, not concerned with the label afforded to the relationship, but the effect of the relationship, specifically sought to protect a state's right to give full faith and credit to same-sex unions regardless of the name given by the state."). Nothing in DOMA's legislative history supports this assertion, and A.K.'s brief specifically rejects the idea that DOMA applies to this case because the parties do not have a legal relationship, much less a marriage. See Respondent's Brief, *supra* note 94, at 51-55.

103. Petitioner's Brief, *supra* note 93, at 34.



impose a broad-based exclusion to judgment recognition jurisprudence that would otherwise recognize those judgments. This section focuses on why appellate courts keep rejecting the argument that DOMA extends to situations involving the PKPA or interstate recognition of other judgments related to same-sex couples' relationships. These courts have made it clear that the current rule of judgment recognition has such strong acceptance that it will not be ignored; this result obtains even in states such as Virginia, Alabama, Oklahoma, and Louisiana, states that have never been at the forefront of granting legal rights to same-sex couples. Their refusal to adopt this argument shows just how unconvincing it is.

The next two subsections look at the policies underlying the PKPA and the commentary by DOMA supporters to explain why DOMA should not be interpreted to extend as far as its language may permit. This analysis concludes the PKPA should be seen as having continuing validity concerning judgments relating to same-sex couples' relationships despite DOMA's attempt to displace it.

*A. The policies underlying the PKPA do not support interpreting DOMA to alter our national policy for resolving custody and visitation disputes and return to the child-snatching and chaos that existed before PKPA was enacted*

The PKPA, not DOMA, should control in child custody or visitation disputes between parents in legally recognized same-sex relationships. The amicus brief of the National Association of Counsel for Children and related organizations submitted in the Virginia Supreme Court as part of the *Miller-Jenkins* litigation is instructive.<sup>104</sup> The brief notes that six to ten million children are being raised in the U.S. by gay or lesbian parents,<sup>105</sup> making it clear that a ruling exempting these children from the protections of the PKPA would have wide-ranging impact. The *Miller-Jenkins* parties' daughter, IMJ, is one of these children; she was one-and-a-half years old when the litigation began and she celebrated her eighth birthday in

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104. Brief for National Association of Counsel for Children et al. as Amici Curiae Supporting Respondent, *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2007) (No. 070933), available at 2007 WL 5649428 [hereinafter Amicus Brief].

105. *Id.* at 13.

April 2010. For almost her entire life, she has been uprooted by the ongoing litigation between her parents.<sup>106</sup> As the brief emphasized, Lisa's acceptance of the Vermont court's original ruling would have ended the case within one year; consequently, IMJ and her parents could have created a routine to help their daughter handle the strain inherent in shuttling between two parents.<sup>107</sup> Although the brief's authors could not have known that the controversy would continue to the present, they made clear why having competing courts and states relitigating custody and visitation creates havoc in these children's lives.

This case is the text book [sic] example of the misfortune a child may suffer if even a single judge disregards the federal and state laws that create a consistent and efficient system of deciding custody and visitation matters. It is long since past time for IMJ's turmoil to end and the [Virginia] Circuit Court's erroneous exercise of jurisdiction to be corrected – for the last time.<sup>108</sup>

The brief emphasized the policy nightmare that existed before the PKPA was adopted. Citing *Thompson v. Thompson*, the brief explained that pre-PKPA law “encourage[d] a parent who does not have custody to snatch the child from the parent who does and take the child to another State to relitigate the custody issue in a new forum,” a possibility that remained open at the time because “child custody orders are subject to modification to conform with changes in circumstances.”<sup>109</sup> In *Thompson*, the Supreme Court noted that “[s]tate courts faithfully administer the Full Faith and Credit Clause every day; now that Congress has extended Full Faith and Credit requirements to child custody orders, we can think of no reason why the courts’ administration of the federal law in custody disputes will be any less vigilant.”<sup>110</sup>

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106. *Id.* at 14.

107. *Id.* at 14.

108. *Id.* at 15.

109. *Id.* at 16 (citing *Thompson v. Thompson*, 484 U.S. 174, 181-82 (1988) (citations omitted)). *Thompson* held that the PKPA did not provide an implied cause of action in federal court to determine which of two conflicting state custody orders was valid, and the statute was intended to have the same effect as the Full Faith and Credit Clause for child custody determinations. *Thompson*, 484 U.S. at 181-82.

110. *Id.* at 187.

The brief explained that the PKPA was needed to address inadequacies of the UCCJA, which was in effect in the late 1970s in a majority of states. Although intended to increase consistency and cooperation, the UCCJA exacerbated the problem by creating the possibility of “parallel proceedings” in different states as long as each state had a “significant connection to and substantial evidence regarding the controversy.”<sup>111</sup> The fact that sister states refused to enforce existing orders allowed modifications of other states’ judgments and made non-UCCJA states “harbors of refuge to the parental kidnapper.”<sup>112</sup>

The PKPA was intended to eliminate these problems by awarding jurisdiction to the child’s “home state” as long as one existed.<sup>113</sup> Additionally, Congress adopted the PKPA to “make the enforcement of a sister state’s custody decision a federal obligation” and “to reduce state-by-state deviations in the interpretation and application of the UCCJA.”<sup>114</sup> Congress clearly expressed its intention that “[s]tate courts that exercise jurisdiction consistently with the criteria in the PKPA are entitled as a matter of Federal law to have their custody and visitation orders given full faith and credit in sister states.”<sup>115</sup>

In an article that ultimately critiques both the UCCJA and the PKPA, Professor Anne B. Goldstein recognized the problems presented in cases that embody the “tragedy of the interstate child.”<sup>116</sup> With prescient vision, Goldstein recognized that the PKPA only solves a situation like the one in *Miller-Jenkins* if the second court, what she called the “asylum court,” defers to the “decree court’s” determination that it had appropriate jurisdiction over the case.<sup>117</sup> If it

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111. Amicus Brief, *supra* note 104, at 18 (citing *Dennis v. Dennis*, 366 N.W.2d 474, 479-80 n.9 (N.D. 1986)).

112. *Id.* at 19 (citing Suzanne Y. LePori, *The Conflict Between the Parental Kidnapping Prevention Act and the Extradition Act: Naming the Custodial Parent Both Legal Guardian and Fugitive*, 19 ST. MARY’S L.J. 1047, 1055 (1988)).

113. *See id.* at 18 (citing 28 U.S.C. § 1738A(c)(2)(B) (2006)).

114. *Id.* at 20 (citing *Bergman v. Zempel*, 807 N.E.2d 146, 154 n.8 (Ind. Ct. App. 2004)).

115. *Id.* at 23 (citation omitted).

116. *See* Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992).

117. *Id.* at 923.

does not, the “asylum court” will make an independent evaluation of the decree court’s jurisdiction and “may well decide that the decree court’s assessment of its own jurisdiction was erroneous.”<sup>118</sup> This is exactly what the Virginia trial court concluded when it held that Virginia’s UCCJEA did not recognize Janet as “a person acting as a parent” with a claim to legal custody under Virginia law, and thus that the PKPA did not apply to the case.<sup>119</sup> Although Goldstein anticipated the problem of whether “asylum courts” would accept a “decree court’s” assertion of continuing jurisdiction, she did not discuss the idea that an asylum court would use substantive law differences between the two states to justify ignoring the decree state’s judgments. Instead, Goldstein explained that asylum courts “usually recognize the decree state’s continuing jurisdiction,” except when: (1) they concluded that the initial decree was not consistent with PKPA’s requirements; (2) the decree court’s own jurisdictional requirements were no longer satisfied; or, (3) the decree state was no longer the residence of the child or any contestant.<sup>120</sup> The policies behind the PKPA underscore its important role in preventing the “tragedy of the interstate child” from happening to children in same-sex families.

*B. DOMA should not be interpreted as altering the “iron” rule of judgment recognition under the Full Faith and Credit Clause*

The U.S. Supreme Court has held that states must give the valid, final judgments from one state “the same credit, validity, and effect” that would be given by the state that rendered the judgment.<sup>121</sup> Supreme Court precedent dating back to 1813 has stated that a judgment from one state is the final resolution of the issues between the parties in all other states.<sup>122</sup> Most commentators agree that Supreme Court precedent “almost always” requires that valid judgments of sister-states be given full faith and credit and that the Court has made clear that “no roving ‘public policy exception’ to the

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118. *Id.*

119. See sources cited *supra* notes 21, 38.

120. Goldstein, *supra* note 116, at 928-29.

121. *Williams v. North Carolina*, 317 U.S. 287, 293-94 (1942).

122. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483-85 (1813); Laycock, *supra* note 66, at 299 n.287.

full faith and credit due judgments” exists.<sup>123</sup> However, through DOMA, Congress has purported to create a different rule for same-sex couples alone; a forum state may refuse recognition to judgments based on rights or claims arising from these couples’ legally valid marriages.<sup>124</sup> This rule is contrary to the one governing virtually every other judgment.

This section considers arguments by some commentators who view DOMA as generally constitutional but seem to ultimately reject its application in the context of PKPA disputes. It also considers appellate court decisions that have upheld interstate recognition of judgments from other states. These decisions recognize legal rights of parents in same-sex relationships, despite mini-DOMA state statutes or constitutional amendments that express a forum policy hostile to those rights. Thus both commentators and courts have concluded that DOMA must be interpreted to have, at most, a limited impact on interstate recognition of judgments.

### 1. Commentators

Professor Mark Rosen has written an excellent, thoughtful, and innovative article discussing whether DOMA is unconstitutional.<sup>125</sup> However, some of his reasoning as to why DOMA may be constitutional becomes far less convincing when considered in context, such as whether child custody and visitation disputes should be governed by DOMA, instead of the PKPA. Professor Rosen argued that the command of the Full Faith and Credit Clause cannot be understood as a provision intended only to unify the states into a stable nation.<sup>126</sup> Rather, he emphasized that “the Clause aims not only

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123. Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 945 (2006). Professor Rosen also contributed to this Symposium and discussions with him have been extremely helpful.

124. See 28 U.S.C. § 1738C (2006).

125. Rosen, *supra* note 123.

126. *Id.* at 935 (“The animating purpose of the full faith and credit command . . . ‘was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the

at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities.”<sup>127</sup> He chided other scholars for focusing exclusively on the promotion of unity, and for failing to recognize the equal importance of ensuring that the union consists of “meaningfully empowered subfederal polities.”<sup>128</sup> Rosen concluded that DOMA is compatible with the principles underlying the Full Faith and Credit Clause and expressed a preference for state autonomy over unification.<sup>129</sup>

But the PKPA also shows a preference for state autonomy by giving the child’s “home state” exclusive jurisdiction over any other state that may have a connection to the child, the parents, or the dispute. The PKPA was designed to protect the initial home state judgment, and thus, in conflicts like *Miller-Jenkins*, DOMA interferes with state autonomy by allowing a state to refuse to recognize this initial judgment.

Additionally, DOMA ignores the interests of the child’s home state under the PKPA, even though the child’s home state has “the dominant, if not exclusive, interest” in regulating who is entitled to be recognized in a child custody or visitation dispute.<sup>130</sup>

For Congress to take away the enforcement effect of a judgment from the state which has the primary responsibility to regulate seems a direct slap in the face to state sovereignty, and it is contrary to well-settled notions of what the Full Faith and Credit Clause is supposed to do.<sup>131</sup>

Equally problematic is that Congress did not elucidate a national standard for conflicting state policies in DOMA; by contrast, the PKPA establishes the standard for determining which state should

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state of its origin.” (citing *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (citations omitted))).

127. Rosen, *supra* note 123, at 935.

128. *Id.* (noting that the Full Faith and Credit Clause protects the “federal interest in national unity” by ensuring that states do not “unjustifiably infring[e] upon the legitimate interests of another State” (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J. concurring))).

129. *Id.* at 938.

130. Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1067 (1999).

131. *Id.*

have jurisdiction in child custody and visitation disputes. Instead, under DOMA, "some state policies are frustrated while others are furthered."<sup>132</sup>

Thus, states which should have equal rights to govern affairs within their legitimate spheres of regulatory authority are divided into two camps: those whose policy balances are deemed legitimate and those whose policy decisions are deemed illegitimate . . . . [S]ome states' judgments become second-class, incapable of extra-territorial enforcement, while other states' judgments have real validity within the federal system.<sup>133</sup>

Professor Rosen then argued that DOMA regulates "a quintessentially federal function" by regulating the extraterritorial effects of state laws permitting same-sex couples to marry, as well as any records or judgments based on such laws.<sup>134</sup> Thus, he asserted that DOMA does not regulate substantive state policies that are properly based on state law, but instead simply regulates the extraterritorial effects of those state policies.<sup>135</sup>

However, DOMA does regulate state policies. As Professor Stanley Cox explained, "DOMA modifies state policy by relegating to second-class status state policies approving same-sex marriages."<sup>136</sup> Congress should be particularly reluctant to adopt substantive rules in these areas because of the domestic relations exception to federal court subject matter jurisdiction for issues concerning divorce, alimony, and child custody disputes in diversity cases.<sup>137</sup>

Professor Rosen further noted that DOMA excludes only those judgments that share "important characteristics with the small class of judgments that the Supreme Court does not require states to enforce, namely, judgments that constitute improper extraterritorial regulation

132. *Id.* at 1078.

133. *Id.* at 1078-79.

134. Rosen, *supra* note 123, at 940.

135. *Id.*

136. Cox, *supra* note 130, at 1076-77.

137. *Id.* at 1077-1078 (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 706-07 (1992)); see also Evan Wolfson and Michael F. Melcher, *Constitutional and Legal Defects in the 'Defense of Marriage' Act*, 16 QUINNIPIAC L. REV. 221, 227-28 (1996).

by the issuing state.”<sup>138</sup> This class of judgments includes those that regulate property in another state, those based on tax or penal statutes, those that enforce anti-suit injunctions, or those that improperly attempt to displace a forum court’s determination of whether to admit evidence.<sup>139</sup> Rosen concluded that DOMA was adopted to prevent same-sex couples from getting married in one state, obtaining a declaratory judgment in that state affirming their marital state, and thus improperly forcing another state to recognize their marriage when usual choice of law rules would not require it to do so.<sup>140</sup> The House Committee report on DOMA stated “it is possible that homosexual couples could obtain a judicial judgment memorializing their ‘marriage,’ and then proceed to base their claim of sister-state recognition on that judicial record.”<sup>141</sup>

Perhaps with regards to declaratory judgments obtained in an effort to force another state to recognize the marriage of a same-sex couple when it otherwise would not do so,<sup>142</sup> Rosen may have a valid argument that such a judgment might not receive interstate recognition.<sup>143</sup> But DOMA does not limit its reach to these declaratory judgments alone; instead, it uses a broad brush to exempt every judgment that involves “a right or claim arising from” a same-sex

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138. Rosen, *supra* note 123, at 945.

139. *Id.* at 946-48

140. *Id.* at 948-49. Professor Rosen considers this to be improper because it attempts to circumvent the usual rule that “the state of residence has virtually exclusive regulatory power over family law matters.” *Id.* at 949. Of course, opposite-sex couples for decades have had their marriages recognized by their home state despite that type of marriage being prohibited in that state, but entered into in a different state. See, e.g., Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIAC L. REV. 61 (1996) (reviewing cases where courts recognized out-of-state marriages of domiciliary couples despite state statutes prohibiting those marriages within the state).

141. Rosen, *supra* note 123, at 948-49 (citing H.R. REP. No. 104-664 at 30, reprinted in 1996 U.S.C.C.A.N. 2905, 1996 WL 391835).

142. See *supra* notes 66-68 and accompanying text.

143. But see Barbara J. Cox, “Coming Out”: *The Practical Battles of Being Visible as a Lesbian*, 5 S. CAL. REV. L. & WOMEN’S STUD. 89, 95-96 (discussing the possibility that same-sex couples may need to seek recognition under each prong of the Full Faith and Credit clause because their marriages may not be recognized by other states, even though opposite-sex couples’ marriages that were also invalid in their home states have been recognized).



couple's marital relationship.<sup>144</sup> Unlike any previous congressional statute enacted under the "Effects Clause," DOMA includes within its purview countless judgments that would ordinarily be entitled to recognition under the "Iron Law of Full Faith and Credit."<sup>145</sup> Rosen himself agrees DOMA should apply only to "nonadversarial declaratory judgments" because to do otherwise would "run afoul" of the requirement that laws enacted by Congress under the Full Faith and Credit Clause must "reflect a 'reasonable' harmonization of the principles of unification and state sovereignty."<sup>146</sup> Thus, Rosen did not craft a rule that would permit DOMA to trump PKPA concerning the types of judgments at issue in PKPA litigation.

Even after conceding that DOMA's reach may not appropriately extend beyond declaratory judgments, Rosen maintains that even if DOMA states a public policy exception to the usual rule of judgment recognition, DOMA can validly do so because it was adopted by Congress to announce "a tightly confined exception, restricted to judgments in connection with same-sex marriage."<sup>147</sup> He viewed such a tightly confined exception as "less threatening to the Full Faith and Credit Clause's goal of creating a union than a 'ubiquitous' exception."<sup>148</sup>

It is difficult to conceive how DOMA's language excluding "any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same-sex that is treated as a marriage. . . or a

144. DOMA, *supra* note 7, § 2(a), 28 U.S.C. § 1738C (2006).

145. See generally William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994); Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 98 (2001).

146. Rosen, *supra* note 123, at 980-81. Rosen acknowledges this problem and says that DOMA should be construed narrowly to avoid applying to judgments that are otherwise subject to recognition. *Id.* at 977-81. Thus, DOMA should not apply to situations involving the PKPA where Congress has made clear that its jurisdictional principles are intended to prevent the problems clearly presented by the *Miller-Jenkins* litigation. See Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, *supra* pp. 28-33 (conceding that only declaratory judgments concerning same-sex couples' marriages should be controlled by DOMA).

147. Rosen, *supra* note 123, at 950-51.

148. *Id.* at 951.

right or claim arising from such relationship”<sup>149</sup> can be seen as tightly confined. If Congress were concerned about the possibility of same-sex couples using a declaratory judgment to force recognition of their marriage in another state, then Congress should have stated a narrow exception through DOMA.<sup>150</sup> But to declare that states do not have to recognize “any judicial proceeding” concerning the hundreds of state rights based on marital or (perhaps) other legal relationships cannot be seen as “tightly confined” in any way.<sup>151</sup>

Thus, the distinction between the PKPA and DOMA becomes clear. It is difficult to understand why the Virginia and Alabama trial courts were willing to displace the PKPA, a proper jurisdictional statute enacted under the “Effects Clause” of the Full Faith and Credit Clause, with DOMA, a statute that runs counter to settled Supreme Court jurisprudence and prior congressional action. Congress limited the PKPA to determining the appropriate jurisdiction(s) for deciding custody and visitation cases, based on their connection to the parties and the litigation. In contrast, DOMA seems to declare: “A same-sex union is always suspect, regardless of how strong the connecting factors were to the rendering jurisdiction.”<sup>152</sup> With the PKPA, Congress “. . . required enforcement of judgments, regardless of the enforcement state’s distaste as to the substantive context of the

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149. DOMA, *supra* note 7, § 2, 28 U.S.C. § 1738C (2006).

150. This Article does not address the question whether such an exception might run afoul of *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003). See generally Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (arguing that under *Romer*, the Fifth Amendment’s Due Process Clause renders DOMA unconstitutional); Mark P. Strasser, “Defending” Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster after Lawrence, 38 CREIGHTON L. REV. 421 (2004-05) (arguing that DOMA cannot be constitutional unless the Supreme Court overrules this line of cases).

151. This is not to mention the 1,138 federal rights that would be available to married same-sex couples if their marriages received federal recognition, a result prevented by section 3 of DOMA. See Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gov’t Accountability Office, to Sen. Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>; see also DOMA, *supra* note 7, § 3(a), 1 U.S.C. § 7 (2006) (limiting recognition to those marriages that are between “one man and one woman”).

152. Cox, *supra* note 130, at 1081.

custody determination . . . .”<sup>153</sup> In contrast, DOMA allows non-enforcement of judgments based solely on the enforcement state’s distaste with same-sex unions.

DOMA’s overreaching with respect to judgments has been criticized from the outset, even by those who otherwise consider it to be constitutional with respect to allowing states to choose for themselves whether to recognize marriages of same-sex couples from other states and defining “marriage” and “spouse” for federal purposes to exclude same-sex couples. As detailed in my 2003 article on full faith and credit and interstate recognition of adoptions by same-sex couples, respected commentators, including Patrick Borchers, Jeffrey Rensberger, and Ralph Whitten, have all concluded that DOMA’s inclusion of all judgments arising from a same-sex couple’s marriage cannot be justified.<sup>154</sup> All three commentators agree that “Congress may have mis-stepped”<sup>155</sup> and that “we may hope that the application of DOMA to judgments will be limited to the ‘declaration of marriage’ scenario and not extended to more traditional judgments.”<sup>156</sup> Fortunately, no appellate courts have been willing to extend DOMA’s reach to judgments enacted in other states and the courts have continued to insist on judgment enforcement without a public policy exception for same-sex couples.

Two additional policies that support the Supreme Court’s “iron” rule of judgment enforcement also support the interpretation that DOMA does not trump the PKPA: finality and nationwide enforcement. Of particular importance in a case like *Miller-Jenkins* where IMJ has been subject to litigation since she was one-and-a-half years old, the Supreme Court has been clear that there is a “national

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153. *Id.*

154. Cox, *Adoptions*, *supra* note 14, at 772-76 (citing articles by Borchers, Rensberger, and Whitten).

155. *Id.* at 774 (citing Jeffrey Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 455 (1998)).

156. *Id.* at 775 (citing Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391 (1998)); *see also* Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235, 1248-49 (2001) (arguing that DOMA should be confined to “bogus” declaratory judgments attempting to require interstate recognition of marriages by same-sex couples).

interest in finality of judgments: litigation must end somewhere.”<sup>157</sup>  
 As the Supreme Court recognized:

The [Full Faith and Credit Clause] compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered.<sup>158</sup>

Enforcement of sister states’ judgments also ensures that each state’s judgments enjoy national recognition. By relinquishing the power to decide cases where other courts have already rendered judgments, each state ensures that its own judgments will also be recognized in all other states.<sup>159</sup> Nowhere is finality and national recognition more important than in cases involving litigation over parental rights, custody, and visitation. The PKPA was adopted to end relitigation by unhappy parents because national policy needed to prevent the ongoing disruption to parents and children when finality was not accorded to these judgments. DOMA should not be interpreted to trump the PKPA and reopen that nightmare for same-sex parents and their children.

*2. Trial courts have been susceptible to the argument that DOMA applies to judgment recognition but appellate courts have rejected this interpretation*

The trial courts of Virginia and Alabama were susceptible to arguments that DOMA changes the Supreme Court’s “iron-clad rule” of judgment recognition under the Full Faith and Credit Clause. However, appellate courts in states with strong public policy statements against recognizing rights for same-sex couples based on their legal relationships have nonetheless rejected the argument that DOMA allows them to refuse to recognize judgments from other states awarding rights to individuals in same-sex relationships. In addition to the Virginia and Alabama Court of Appeals’ decisions discussed above, the recent Fifth Circuit Court of Appeals opinion in

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157. Cox, *Adoptions*, *supra* note 14, at 777 (citations omitted); *see also* Williams v. North Carolina, 317 U.S. 287, 303 (1942).

158. Riley v. N.Y. Trust Co., 315 U.S. 343, 348 (1942).

159. *See* Cox, *Adoptions*, *supra* note 14, at 777-78.

*Adar v. Smith*,<sup>160</sup> although concerning interstate recognition of an adoption decree, is instructive. That decision rejected the argument that non-recognition of judgments is permissible under our federal system of government that requires one state to subjugate its local public policy in order to support national unity with regards to valid, final judgments issued in another state. The Fifth Circuit Court of Appeals' decision is also consistent with that of the Tenth Circuit Court of Appeals in *Finstuen v. Crutcher*.<sup>161</sup> The *Finstuen* court is the only other federal appellate court to consider this argument in the context of interstate recognition of an adoption decree.

In *Adar*, two gay men adopted a son who was born in Louisiana for whom they received a joint adoption decree from a New York state court.<sup>162</sup> The parents then applied to the Registrar of Louisiana's Office of Vital Records and Statistics seeking a new birth certificate listing the two men as the parents of their son.<sup>163</sup> The Registrar refused to issue the new birth certificate, relying on an opinion from the Louisiana Attorney General that the state did not owe full faith and credit to the adoption judgment "because [the judgment] is repugnant to Louisiana's public policy of not allowing joint adoptions by unmarried persons."<sup>164</sup>

The adoptive parents filed an action in federal court. Granting summary judgment in their favor, the district court held "Louisiana owes full faith and credit to the New York adoption decree and that there is no public policy exception to the Clause."<sup>165</sup> The Registrar then appealed to the Fifth Circuit Court of Appeals, which affirmed.

The Court of Appeals began its opinion by citing the Tenth Circuit Court of Appeals decision of *Finstuen v. Crutcher*, where three

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160. 597 F.3d 697 (5th Cir. 2010), *reh'g en banc granted*, 622 F.3d 426 (5th Cir. 2010).

161. 496 F.3d 1139 (10th Cir. 2007).

162. *Adar*, 597 F.3d at 701.

163. *Id.*

164. *Id.* For a discussion of why adoption decrees should not be impacted by DOMA because they do not arise under marriage, civil unions, or domestic partnerships, but instead are available to same-sex partners who do not marry, see Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 79 (2004-2005).

165. *Adar*, 597 F.3d at 702.

same-sex couples challenged an amendment to Oklahoma's foreign adoption statute prohibiting Oklahoma from recognizing adoptions by same-sex couples.<sup>166</sup> There, the district court held the statute unconstitutional under the Full Faith and Credit Clause, and the Court of Appeals agreed.<sup>167</sup> The appellate court "reasoned that each State owes full faith and credit to every other state's judgments . . . . [T]he amended adoption statute's categorical refusal to recognize out-of-state judgments was unconstitutional."<sup>168</sup> The state was required to issue a new birth certificate because to do otherwise "would be a violation of the 'evenhanded' requirement in applying local enforcement mechanisms to foreign judgments."<sup>169</sup> The U.S. Supreme Court imposed this requirement in *Baker v. General Motors* and required that even-handedness be applied in each state so that all judgments from other states are enforced in the same fashion.<sup>170</sup>

In its discussion of the Full Faith and Credit Clause, the *Adar* court insisted that an out-of-state judgment must be given the same effect in other states as it receives in the issuing state, noting that "[s]uch expansive full faith and credit was later held not to be owed to a statute enacted in another state, however, when the forum state is competent to legislate on the matter."<sup>171</sup> It then discussed the "exacting" requirement that full faith and credit be accorded to judgments from sister-states and rejected the notion that "roving public policy exceptions" should permit a state to "refuse to recognize an out-of-state judgment on the grounds that the judgment would not

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166. *Id.* at 703 n.7 (citing *Finstuen v. Crutcher*, 496 F.3d 1139, 1142 (10th Cir. 2007)); see also Lisa S. Chen, *Second Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171 (2005) (arguing Oklahoma statute is unconstitutional); Robert G. Specter, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467 (2005) (same).

167. *Finstuen*, 496 F.3d at 1156.

168. *Adar*, 597 F.3d at 703 n.7 (citing *Finstuen*, 496 F.3d at 1154-56).

169. *Id.*

170. *Baker*, 522 U.S. at 235.

171. *Adar*, 597 F.3d at 707 (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003)); *Baker*, 522 U.S. at 232; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); see also Wasserman, *supra* note 13, at 21-22 (discussing full faith and credit owed to statutes).

obtain in the forum state.”<sup>172</sup> The court concluded, “there is virtually universal acknowledgement that Louisiana owes full faith and credit to the New York adoption decree and *must* recognize that the Adoptive Parents are Infant J’s legal parents.”<sup>173</sup>

After rejecting several other arguments raised by the Registrar, the *Adar* court found that the Full Faith and Credit Clause is a “*mandatory*, constitutional curb on every state’s sovereign power, [providing] a state . . . *no discretion* to disregard a decision of another state on a matter over which that other state is competent to exercise jurisdiction.”<sup>174</sup> The court continued:

Under [the Registrar’s] reasoning, to the extent a judgment incorporates the statutory—and repugnant—public policy of the adjudicating state, a forum state would be free to ignore the adjudicating state’s *judgment* as an improper substitution for the forum state’s *statute*. Such a reading, for the purpose of interstitially importing such an illicit “public policy exception” to the reach of the Clause, is utterly contradicted by precedential full faith and credit jurisprudence.<sup>175</sup>

As demonstrated in *Finstuen* and *Adar*, as well as in the Court of Appeals decisions from Virginia in *Miller-Jenkins* and from Alabama in *A.K. v. N.B.*, appellate courts see no basis for displacing full faith and credit precedent merely to deny judgment recognition to same-sex couples asserting parental rights.

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172. *Adar*, 597 F.3d at 707-08 (citing *Baker*, 522 U.S. at 233 and *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

173. *Id.* at 708 n.34 (citing *Finstuen*, 496 F.3d at 1156 (where that court collected authorities from nine jurisdictions concluding that adoption decrees were owed full faith and credit)); *see also* *Alexander v. Gray*, 181 So. 639, 645 (La. Ct. App. 1938) (holding that Louisiana affords full faith and credit to out-of-state adoption judgments).

174. *Id.* at 710 (citing *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943) (“We are aware of no . . . considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to . . . a judgment outside the state of its rendition.”)).

175. *Id.* at 710.

## IV. CONCLUSION

This Article began by noting that Lisa Miller refuses to relinquish custody of her daughter to Janet Jenkins, her ex-partner and a legally-recognized parent of their daughter, more than seven years after the parties' custody dispute first gained national attention. Much of her resistance seems to stem from the positive legal action she obtained in Virginia, where a trial court twice vindicated her attempt to ignore the legal judgments from Vermont requiring Lisa to share parenting with Janet. But for those court orders, Lisa may well have realized she had to face what every divorcing couple faces: somehow the two parents who were partners need to develop the ability to interact with their ex to help their children transition from an intact family to two separate families.

These challenges are difficult enough when they do not involve constitutional theory, opposing state policies, interstate recognition of judgments, and two federal statutes. But when they do, parents and their children are not helped by being convinced that their problems require extraordinary answers. Lisa and Janet needed to work out their differences to help their daughter cope with losing her intact family.

Congress has caused much of the parties' problems by adopting two statutes that seemingly conflict. While one requires state courts to recognize a judgment from a sister state when that state had jurisdiction to resolve custody or visitation disputes between parents, the other appears to allow a state to ignore that judgment despite two hundred years of judicial precedent in an attempt to minimize the spread of legal relationships between same-sex couples. This Article has used two cases between lesbian ex-partners and their children to highlight the impossible situations that result when one state ignores settled constitutional law requiring interstate recognition of valid judgments. Both policy and precedent support interpreting DOMA in such a way so as not to disrupt the solution established by the PKPA.

The mistake that Congress made—sweeping too broadly in DOMA's overreaction to the possibility of marriage between same-sex couples—should not negate settled policy under the PKPA, which helps couples solve custody and visitation disputes when their relationships end. Still, this Article's discussion as to why DOMA cannot be allowed to trump the PKPA should not be confined to these



cases alone, but instead should be used to recognize the inherent problems that DOMA raises as national policy. The recent decision by the Massachusetts District Court that DOMA is unconstitutional as far as preventing married same-sex couples in Massachusetts from obtaining federal benefits available to all other married couples in the U.S. underscores the reasons why DOMA must be repealed.<sup>176</sup> Until it is repealed, our appellate courts must continue to refuse to implement its policies. As the cases cited in this Article show, appellate courts recognize the disruption DOMA would bring to settled constitutional doctrine, and they reject its ability to dismantle the important and settled law created by the PKPA.

We can only hope that Lisa Miller will soon resolve her dispute with Janet Jenkins, and allow their daughter to receive love and support from each of her parents. And we can only hope that our appellate courts will continue to serve the important roles they serve in limiting DOMA's reach until it is repealed or declared unconstitutional by the Supreme Court.

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176. Memorandum Opinion, *Massachusetts v. U.S. Dept. of Health & Human Servs.*, No. 1:09-11156-JLT (July 8, 2010).